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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Axonn, L.L.C.

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Serial No. 76376728
Serial No. 76376729

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Charles C. Garvey, Jr. of Garvey, Smith, Nehrbass & Doody, L.L.C. for Axonn, L.L.C.

Caroline Fong Weimer, Trademark Examining Attorney, Law Office 115 (Tomas Vlcek, Managing Attorney).

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Before Seeherman, Bottorff and Rogers, Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Axonn, L.L.C. has applied to register, on the Principal Register, the designations INDUSTRIAL WIRELESS DATA SOLUTIONS (Serial No. 76376728) and INDUSTRIAL WIRELESS (Serial No. 76376729) for "radio frequency engineering services," in Class 42. Each application is based on applicant's assertion of its bona fide intention to use the proposed mark in commerce. Also, by requirement

of the examining attorney, each application includes a claim of ownership of Registration No. 2449667 for the mark WIRELESS DATA SOLUTIONS THAT WORK for the same services as the two involved applications.[1]

The examining attorney refused registration of the proposed marks, asserting that they are merely descriptive of applicant's services. When each refusal was made final, applicant filed an appeal and a request for reconsideration. Each of the requests for reconsideration was denied. Applicant and the examining attorney filed separate briefs in each case; applicant did not request an oral hearing. In view of the related nature of the issues presented by the appeals, the Board has chosen to issue this single decision.

In assessing the evidence of record and the likely perception of the designations used by applicant, we adopt the point of view of the average or ordinary consumer in the class of prospective purchasers for applicant's services. *See* In re Omaha National Corp., 819 F.2d 1117, 2 USPQ2d 1859, 1861 (Fed. Cir. 1987). Moreover, whether a designation is merely descriptive is determined not in the

[1] The claimed registration is on the Principal Register, without any reliance on a claim of acquired distinctiveness under Section 2(f), 15 U.S.C. § 1052(f), and does not include a disclaimer of any of the words in WIRELESS DATA SOLUTIONS THAT WORK.

abstract, but in relation to the goods or services for which registration of the designation is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the designation would have to the average purchaser because of the manner of its use. *See* In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

Whether consumers could guess what the service is from abstract consideration of a proposed mark is not the test. In re American Greetings Corp., 226 USPQ 365, 366 (TTAB 1985). Likewise, whether a prospective purchaser of applicant's services would or, as applicant contends, would not think of one or both of applicant's proposed marks when considering only the identification of services, also is not the test. However, the evidence must establish that the designations immediately describe a quality, characteristic or feature of applicant's services or convey information regarding the nature, purpose or utility of the services. *See* In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978); *see also*, In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987).

We consider first the two-word designation INDUSTRIAL WIRELESS. When the examining attorney refused registration, she noted that INDUSTRIAL is descriptive of a

field of use or application for applicant's services. In support of the point she included reprints of certain web pages posted on the Internet by applicant. One page is titled "AXONN Spread Spectrum Industrial Wireless Home Page" and shows applicant offers AXESS branded products "suitable for a variety of wireless data collection, SCADA and telemetry tasks. Using AXONN's proven spread spectrum technology which requires no FCC licensing, AXESS is the solution for integrating telemetry services into an industrial environment." Later on the same page, within a passage about applicant in general, is the following: "world leader in designing and manufacturing innovative wireless data communication solutions" and "proven technology provides secure wireless data links for industrial, commercial, residential and remote monitoring applications worldwide."

As to the term WIRELESS, the examining attorney contends that "radio frequency engineering services" are, in essence, engineering services related to wireless communications. To support this point, the examining attorney relies on a dozen excerpts of news stories retrieved from the NEXIS database. The following are two examples:

> Micro Systems Inc. of Fort Walton Beach has turned the radio frequency technology they developed for the military into a wireless, interactive educational tool for schools and businesses.
> Northwest Florida Daily News, June 6, 2002; and
>
> Cree Microwave designs, manufactures and markets a line of radio frequency power semiconductors, one of the main components in building wireless infrastructure for cellular and PCS telephones.
> The Herald-Sun (Durham, N.C.), June 4, 2002

In response, applicant did not contest the examining attorney's evidence in any way. The entire response it made was the statement "It is submitted that the mark as a whole is suggestive, considering the services." After the refusal of registration was made final, applicant repeated the above statement in its request for reconsideration and added only the following argument: "While [INDUSTRIAL WIRELESS] might be considered suggestive of [radio frequency engineering] services, certainly if you were to ask one hundred people for other names for radio frequency engineering services, it is respectfully submitted that not a single one would state 'Industrial Wireless' as another term for radio frequency engineering services." Request

for reconsideration, p. 1. Subsequently, applicant repeated these same contentions in its appeal brief.[2]

The examining attorney, in her brief, has requested that we take judicial notice of dictionary definitions of "industrial" and "wireless." Applicant did not file a reply brief and did not object to the examining attorney's request, which we grant. The first of three definitions provided by the examining attorney for "industrial" is "of, relating to, or resulting from industry: *industrial development; industrial pollution*." The provided definition of "wireless" is "having no wires: *a wireless security system*." We also take judicial notice of the following definition of "wireless": "Radio transmission via the airwaves. Various communications techniques are used to provide wireless transmission including infrared line of sight, cellular, microwave, satellite, packet radio and spread spectrum." The Computer Glossary 438 (7th ed. 1995).

The examining attorney contends that the evidence clearly establishes that the goods employed in data collection systems offered by applicant have industrial

[2] The request for reconsideration and brief each were two pages long. They contain no discussion of the evidence or any arguments other than those quoted herein.

applications and employ radio frequency or wireless technology. She further contends that applicant's engineering service supports these goods and INDUSTRIAL WIRELESS is therefore as descriptive of the services as it is of the goods. Finally, the examining attorney argues that while the combination of two individually descriptive terms may, in certain circumstances, result in a registrable mark, in this case the combination of INDUSTRIAL and WIRELESS does not; the combination, she contends, does not result in any incongruity, ambiguity, or any distinctive commercial impression.

"Industrial" and "wireless" are certainly descriptive terms when used individually on applicant's web page. Thus, unless the combination of these two descriptive terms results in some sort of distinctive creation, competitors likewise should be free to use the terms separately or in combination. Estate of P.D. Beckwith, Inc. v. Commissioner of Patents, 252 U.S. 538 (1920); In re Colonial Stores, Inc., 394 F.2d 549, 157 USPQ 382 (CCPA 1968). We agree with the examining attorney that the combination of "industrial" and "wireless" does not result in any ambiguity, incongruity or any sort of combination that could be said to be distinctive.

We also agree with the examining attorney that INDUSTRIAL WIRELESS is not merely suggestive of applicant's services, a possibility which applicant admits, but instead is merely descriptive. "Radio frequency engineering services" is a broad identification and must be read to encompass all sorts of engineering services that relate to radio frequency or wireless communications, whether those communications involve voice or data. Such engineering services can include design of systems, deployment of systems, including adaptation of standard or generic products for specialized applications, and troubleshooting or maintenance of such systems. Industrial consumers or purchasing agents, in the market for engineering services relating to design, deployment, adaptation of, or maintenance of a wireless voice or data communications system, when confronted with the term INDUSTRIAL WIRELESS used by a firm offering such services, will not have to engage in any thought or exercise of imagination to conclude that INDUSTRIAL WIRELESS describes characteristics of radio frequency engineering services of various types for use in industrial settings.[3]

[3] We do not agree with the examining attorney's contention that "wireless" and "radio frequency" have been shown by the NEXIS evidence to be "one and the same," but we do find that various types of radio frequency transmissions are all aptly termed "wireless" communications.

Accordingly, we affirm the refusal of registration of INDUSTRIAL WIRELESS. We now consider the refusal to register INDUSTRIAL WIRELESS DATA SOLUTIONS.

The application to register INDUSTRIAL WIRELESS DATA SOLUTIONS has essentially the same evidence and the same arguments by applicant as the application to register INDUSTRIAL WIRELESS. The only difference is that the examining attorney has requested that we take judicial notice of dictionary definitions for each of the four words in INDUSTRIAL WIRELESS DATA SOLUTIONS. Again, applicant has not objected to this request, which we grant.

We have previously recited the definitions for "industrial" and "wireless". The definitions provided by the examining attorney for "data" are "Factual information, especially information organized for analysis or used to reason or make decisions" and "*Computer Science*. Numerical or other information represented in a form suitable for processing by computer." The provided definitions for "solution" are "The method or process of solving a problem" and "The answer to or disposition of a problem."

In essence, the examining attorney argues that each of these four words is descriptive when used in connection with applicant's services, as evidenced by applicant's own use of the terms on its web pages and by the proffered

dictionary definitions, and that the combination of the four does not create a distinctive slogan or mark. She reasons that applicant's services have industrial applications, relate to wireless communication of data and provide those who need to conduct such data gathering with solutions to their problems. In regard to the web page references, we have previously recited some of the phrases and sentences that use the terms in question.[4] We also note applicant's use, in a descriptive manner, of the phrase "clear leader in low data rate, high functionality wireless solutions."

We agree with the examining attorney that each of the four terms is used descriptively by applicant on its web pages and, when strung together, retain their descriptive significance and do not take on any distinctive characteristic. In particular, applicant's use of the phrase "innovative wireless data communication solutions" is practically a use of that which applicant proposes to register as a mark, INDUSTRIAL WIRELESS DATA SOLUTIONS. Applicant has merely substituted the descriptive term

[4] Applicant, we have noted, touts its AXESS products as "suitable… for wireless data collection…. AXESS is the solution for integrating telemetry services into an industrial environment." Also, applicant has described itself by the following phrase: "world leader in designing and manufacturing innovative wireless data communication solutions."

"industrial" for the laudatory term "innovative" and omitted the word "communication." The word "communication" however, is virtually implied in the proposed mark, because applicant's wireless systems are "for communicating data." *See* Remington Products Inc. v. North American Philips Corp., 892 F.2d 1576, 13 USPQ2d 1444, 1447-48 (Fed. Cir. 1990).

Again we note that "radio frequency engineering services" is a broad identification of services and would encompass the types of services promoted on applicant's web pages, e.g. "research, development and commercialization of Radio Frequency spread spectrum devices … for communicating data." Industrial customers or purchasing agents seeking such services would, when contemplating INDUSTRIAL WIRELESS DATA SOLUTIONS, immediately know that applicant's "radio frequency engineering services" would allow for engineering of solutions for wireless communication of data in industrial settings. Prospective would not need to pause and think about what the services would involve or have to exercise any imagination to draw conclusions about the nature of the services.

We affirm the refusal to register INDUSTRIAL WIRELESS DATA SOLUTIONS.

The fact that the applicant, according to its web pages, may also offer its services for residential or other non-industrial applications does not render either proposed mark registrable. *See* In re Quik-Print Copy Shop, Inc., 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980), In re Patent & Trademark Services Inc., 49 USPQ2d 1537, 1539 (TTAB 1998). Likewise, the fact that applicant has obtained a registration for WIRELESS DATA SOLUTIONS THAT WORK for the involved services does not dictate that either of the proposed marks now before us must be registered. We agree with the examining attorney that that phrase, a slogan, presents a somewhat different commercial impression. In any event, each application is to be judged on its own merits. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).

Decision: The refusal of registration under Section 2(e)(1) is affirmed in each of the involved applications.